Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CURR-SPEC PARTNERS, L.P., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has long required that all federal courts recognize the inherent limited nature of their own subject matter jurisdiction. To further that end, the Court has required the lower courts, including the Tax Court, to constantly examine their jurisdiction and, whenever jurisdiction is questioned, to presume its absence and require the party invoking it to carry the burden of proof. In the instant case, the Tax Court ignored the narrow jurisdictional constraints on its authority to adjudicate matters relating to the return filed by a partnership. In particular, Congress has directed that the Tax Court's authority to hear and resolve matters concerning a partnership is limited to the partnership and its return. The Tax Court, however, ignored this restriction and looked to the tax return of the individual partners in order to avoid the limitations bar that would otherwise apply to the proceeding against the partnership. In affirming, the Fifth Circuit sharpened and expanded its conflict among the circuits.

When a Federal court sidesteps its obligations in the face of a challenge to its jurisdiction, or by judicial interpretation expands its subject matter jurisdiction, this Court obligates the Court of Appeals to enforce this Court's rules for limiting jurisdiction. This occurs either by making its own determination or by mandating that the court below address the challenge. The Tax Court below (a) failed to determine whether it had the subject matter jurisdiction to decide a matter concerning a statute of limitation, (b) failed to impose the burden of proof on the party seeking the exercise of jurisdiction in its favor on that matter, and (c) failed to determine the

effect of jurisdiction in its judicial interpretation of a statute of limitation.

Two questions are presented:

1. Whether the Fifth Circuit erred in affirming the Tax Court's interpretation of a statute of limitation resulting in judicial expansion of its jurisdiction beyond the scope set by Congress.

2. Whether the D.C. and Federal Circuit Courts, and now the Fifth Circuit, erred by (a) failing to consider subject matter jurisdiction in their interpretation of a non-jurisdictional statute, resulting in judicial expansion of jurisdiction, and (b) dividing from seven other Circuits that interpreted the same statute based on limited subject matter jurisdiction.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Curr-Spec Partners, L.P. v. Commissioner of Internal Revenue*, 579 F.3d 391 (5th Cir. 2009). The Fifth Circuit affirmed the September 24, 2007 decision of the United States Tax Court reported at *Curr-Spec Partners, LP, Curr-Spec Managers, LLC, Tax Matters Partner v. Commissioner of Internal Revenue*, T.C. Memo. 2007-289 (2007).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

> The Congress shall have power...to constitute tribunals inferior to the Supreme Court...

United States Constitution, Art. III, § 2

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States...

Internal Revenue Code, 28 U.S.C. § 6226(f):

> (f) Scope of judicial review
>
> A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the

> partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

Internal Revenue Code, 28 U.S.C. § 6231(a)(3) and (4):

> (3) Partnership item
>
> The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.
>
> (4) Nonpartnership item
>
> The term "nonpartnership item" means an item which is (or is treated as) not a partnership item.

STATEMENT

This case is governed by the unified partnership audit and litigation procedures established by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324, 648-671 ("TEFRA"). The TEFRA unified partnership procedures require a special proceeding, focused solely on a partnership's tax return and those legal and factual matters related to the partnership as a whole, distinct, independent, and wholly

segregated from all legal and factual matters related to any individual partner. The relevant statute, 26 U.S.C. 6226(f), empowers a court hearing a partnership case to hear and decide only those partnership items for the tax year relating to an FPAA (a "notice of final partnership administrative adjustment" which the Commissioner issues to change a partnership return). As described succinctly by the Eleventh Circuit:

> TEFRA created, *inter alia*, a new scheme for partnerships, pursuant to which partnership items would no longer be audited partner-by-partner. Rather, under TEFRA, all common partnership items are evaluated in one uniform proceeding to determine those items applicable to all partners. Thereafter, individual partner-level proceedings are held as to items unique to the partners. [1]

No legal or factual matter unique to an individual partner may be heard in a TEFRA partnership case because litigation of individual partner facts and legal issues occurs in later separate, individual partner cases.[2] Similarly, in those later, separate, individual partner cases, TEFRA jurisdictionally bars the trial court from deciding any matter related to the partnership tax return as changed by the FPAA. These mutually exclusive limits on subject matter jurisdiction keep the trial courts focused as Congress intended.

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1 *Rose v. Comm'r.*, 07-12245, 11 n. 9 (11th Cir. 4-24-2008)(unpublished).

2 *See Callaway v. Comm'r.*, 231 F.3d 106, 108 and 117 (2d Cir. 2000) (finding that TEFRA's centralized proceedings do not apply to treatment of nonpartnership items).

In the Tax Court below, Curr-Spec brought an action for judicial review under § 6226 of the TEFRA Unified Partnership Procedures in response to the government's FPAA purporting to change its 1999 partnership tax return. Curr-Spec pled the bar of the statute of limitations because the government issued its FPAA more than three years after the 1999 tax return filing date. The Commissioner answered by pleading that the Tax Court should rely instead on the filing dates of the individual partner returns and decide the FPAA limitations under nonpartnership statute of limitations of § 6501 (a). Curr-Spec moved to dismiss such allegations for lack of jurisdiction but the Tax Court denied petitioner's plea to jurisdiction. Notably, the Tax Court did not require the government to establish the jurisdictional basis supporting its attempt to rely on the individual partner's statute of limitations, notwithstanding the terms of TEFRA.

The Fifth Circuit affirmed and denied Curr-Spec's motion for rehearing *en banc* on October 15, 2009.

REASONS FOR GRANTING THE PETITION

I. Review is Warranted to Restrain Improper Judicial Expansion of Federal Court Subject Matter Jurisdiction in the Interpretation of a Statute of Limitation.

Federal courts are courts of limited jurisdiction; they possess only that power authorized by the Constitution and by Congress.[3] This Court frequently

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3 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1984); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

writes[4]:

> As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction. . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

This Court guards against expansion by judicial interpretation by presuming all matters lie outside this limited jurisdiction[5] and by imposing the burden of establishing the contrary on the party asserting jurisdiction.[6] The Tax Court, a special Article I court, exercises Article III judicial power in the same way, with subject matter jurisdiction limited by Congress, as the federal district courts exercise theirs.[7]

Congress enacted the unified partnership audit and litigation procedures, 26 U.S.C. § 6221, *et. seq.*, and created a two-step procedure that begins with a partnership only case limited solely to partnership items, the result of which binds all partners. Thereafter,

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4 *Rasul v. Bush*, 542 U.S. 466, 489 (2004).

5 *Id.*; *see also Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799).

6 *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

7 *Freytag v. Commissioner*, 501 U.S. 868, 890-891 (1991); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-851 (1986).

Congress called for separate proceedings involving individual partners—limited to nonpartnership items and barring consideration of the previously determined partnership items. The relevant jurisdictional provision for a step-one partnership case is 26 U.S.C. 6226(f), which limits the scope of jurisdiction for such a partnership case to those legal and factual matters related to the partnership *qua* partnership:

> (f) Scope of judicial review
>
> A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

TEFRA defines a "partnership item" in 26 U.S.C. § 6231 (a)(3):

> The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for the purposes of [subtitle F], such item is more appropriately determined at the partnership level than at the partner level.

Conversely, TEFRA defines a "nonpartnership" item in 26 U.S.C. § 6231 (a)(4) as any item that is not a partnership item. As noted by the Second Circuit[8], the distinction governs jurisdiction which "turns on the classification, for the purposes of subtitle F, of the items to which the tax deficiencies were attributable. If those items were classified as partnership items, subchapter C [the TEFRA partnership procedures] would apply. *See* I.R.C. §§ 6221, 6211(c), 6216 (4). If those items were classified as nonpartnership items, then subchapter C *could* not apply. *See, e.g.*, I.R.C. § 6226 (f); *Maxwell*, 87 T.C. at 788." *Id.* at 117. (*emphasis in original*)

The Fifth Circuit decided *Weiner v. U.S.*[9], the seminal authority establishing the standard by which TEFRA trial courts determine whether a matter is a partnership item or not. The *Weiner* opinion requires that a decision about the FPAA statute of limitations, which it decided is a partnership matter, may be decided solely in a step-one partnership-only case "because the FPAA limitations issue affects the partnership as a whole, it should not be litigated in an individual partner proceeding, as such a result would contravene the purposes of TEFRA."[10] Concerning the substantive FPAA limitations issue, the Fifth Circuit held that "the FPAA statute of limitations determination challenged in this case *deals with facts specific to the partnership.* The

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8 *Callaway v. Comm'r.*, 231 F.3d 106 (2nd Cir. 2000).

9 *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004).

10 *Id.* at 156-7.

court need not consider...an individual's communications with the IRS."[11]

Because individual partner statutes of limitations under § 6501 (a) are legal issues solely concerning individual partners based on individual partner filing dates, and do not affect the partnership as a whole, TEFRA jurisdiction flowing from § 6226(f) bars them from being litigated in Curr-Spec's partnership-level case below. However, Curr-Spec brought a TEFRA step-one partnership case in the Tax Court under 26 U.S.C. § 6226 claiming that the Commissioner issued its FPAA purporting to change Curr-Spec's 1999 partnership tax return beyond the three-year period of 26 U.S.C. § 6229 from the return filing date. The Commissioner answered that the FPAA was timely pursuant to § 6501 (a) because it issued within three years of the filing of 2000 and 2001 year tax returns *of an individual partner.* Curr-Spec moved to strike, for lack of jurisdiction, the Commissioner's § 6501 (a) allegations about individual partner tax return filing dates. The Tax court denied the motion.

The Tax Court theorized that if Curr-Spec were correct it could not apply its precedent in *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r,*[12] that purports to interpret the relationship between § 6229 as the TEFRA statute of limitations and § 6501 (a), the general limitations under the Internal Revenue Code.[13] However,

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11 *Id.* at 157 (*emphasis added*).

12 *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r,* 114 T.C. 533 (2000), *appeal dismissed and remanded,* 249 F.3d 175 (3d Cir. 2001).

13 *Curr-Spec v. Comm'r,* T.C. Memo 2007-289 at 9 n.4.

Rhone-Poulenc did not consider or address the antecedent question of whether the Tax Court must first address whether the individual partner statute of limitations would be within the Tax Court's competence given the jurisdictional restrictions of § 6226(f). Accordingly, it gave no force to this Court's presumption against subject matter jurisdiction and, quite to the contrary, simply assumed its jurisdiction—in the face of a statute and statutory scheme intentionally drawn by Congress to narrow the Tax Court's power to issues concerning the partnership as distinct from its constituent partners.

The Fifth Circuit affirmed. Rather than determine whether the Tax Court possessed the jurisdiction in a TEFRA step-one partnership case to decide a strictly partnership issue based on facts unique to any partner, the Court below erred by re-examining the *Rhone-Poulenc* holding and affirming both that case and the Tax Court's decision in this case below. It committed this error by failing to determine whether § 6501 (a) limitations could, in any way, be a partnership item under § 6231 (a)(3) as the prerequisite for jurisdiction. Instead, the Circuit Court below merely saw Curr-Spec's jurisdictional challenge as a novel attack on *Rhone-Poulenc* rather than as a plea to the Tax Court's jurisdiction. It ultimately erred by failing to follow the law of this Court, which as early as 1799 established a presumption against jurisdiction[14] and imposes the burden on the proponent of expanding jurisdiction.[15]

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14 *Kokkonen*, 511 U.S. at 377 citing *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799).

15 *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178,

Because Curr-Spec's appeal to the Fifth Circuit focused on the Tax Court's lack of jurisdiction, the Fifth Circuit ruled that the Tax Court had jurisdiction based on § 6226(d)(1) which provides that every partner

> shall be permitted to participate in [partnership-level litigation] solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired *with respect to such person*, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.[16]

The Circuit Court below erred by disregarding the fact that no partner made such an appearance and therefore the jurisdiction granted by 26 U.S.C § 6226 (d)(1) was never invoked.

The Fifth Circuit erred by deferring to, and affirming, the Tax Court's decision that the FPAA statute of limitations, clearly a partnership item, could be decided based on the nonpartnership limitations under § 6501 (a) using facts unique to individual partners. This Court, by contrast, holds that special Article I courts, such as the Tax Court, have "no special expertise in interpreting their authorizing statutes if an issue can be characterized as jurisdictional, see *Schor, supra*, at 845,"[17] By refusing to substantively consider Curr-Spec's

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182-183 (1936).

16 *Curr-Spec Partners*, 579 F.3d at 395-96 (*emphasis in the original*).

17 *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring, citing *CFTC v. Schor*, 478 U.S. 833, 844 (1986)).

jurisdictional challenge, the Tax Court erred by "interpolat[ing] into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction."[18]

The Fifth Circuit's error, in deferring to the Tax Court's judicial expansion of its jurisdiction, divided it from every other Circuit Court interpreting the FPAA limitations based, limited jurisdiction in TEFRA cases, merits this Court's review.

II. Review is Warranted to Resolve a Lopsided Split Between the Seven Circuits interpreting the Statute of Limitations based on Subject Matter Jurisdiction and the Three Circuits that Ignore Jurisdiction.

The Fifth Circuit below wrote, that by interpreting § 6229 as they did they were following *Rhone-Poulenc* and two Circuit Courts:[19] the D.C. Circuit's opinion in *Andantech L.L.C. v. Commissioner*[20] and the Federal Circuit's opinion in *AD Global Fund, LLC v. United States*.[21] As additional justification, the Fifth Circuit wanted to avoid creating a split with these other Circuit Courts ("We are always chary to create a circuit split.")[22] However, the Court of Federal Claims in *AD Global Fund* acknowledged a recent split from the

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18 *United States v. Mine Workers*, 330 U.S. 258, 314 (1947).

19 *See Curr-Spec Partners*, 579 F.3d at 396-7.

20 *Andantech L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003).

21 *AD Global Fund, LLC v. United States*, 481 F.3d 1351 (Fed. Cir. 2007).

22 *Curr-Spec Partners*, 579 F.3d at 399 n. 37.

broad authority already in existence concerning whether partnership limitations are partnership items to be decided by reference to the partnership and not its partners, well before the Federal Circuit affirmed its decision:

> While this court agrees with defendant that the most recent court decisions were in defendant's favor, the circuits have split regarding the proper interpretation of section 6229(a). *Compare Weiner v. United States*, 389 F.3d 152 (5th Cir. 2004) (viewing section 6229(a) as separate statute of limitations), and *Callaway v. Comm'r*, 231 F.3d 106 (2d Cir. 2000) (same), with *Andantech, L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003) (holding that section 6229(a) operates as extension of time rather than separate statute of limitations).[23]

On one side of this argument, most Circuit Courts correctly limit the jurisdiction of a trial court, when faced with a TEFRA partnership statute of limitations challenge, to legal and factual issues related to the subject partnership: The First Circuit in *CC&F W. Operations Ltd. Pship. v. Commissioner*;[24] the Second Circuit in a series of opinions; [25] the Fifth Circuit in *Weiner* prior to

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23 *AD Global Fund, LLC v. United States*, 67 Fed. Cl. 657, 660 (2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007).

24 *CC&F W. Operations Ltd. Pship. v. Commissioner*, 273 F.3d 402, 405 (1st Cir. 2001) (deciding the case based on Sec. 6229 as the sole statute of limitations for assessment of tax from partnership items).

25 *Chimblo v. Comm'r*, 177 F.3d 119, 125 (2d Cir. 1999)("under TEFRA, a statute of limitations defense concerns a 'partnership item,' see IRC § 6231 (a)(3)"); *Callaway v. Commissioner*, 231 F.3d 106 (2d Cir. 2000)(discussed at length *infra*); *Madison Recycling*

this case, discussed at length *infra*, and other Fifth Circuit cases;[26] the Sixth Circuit;[27] the Seventh Circuit in *Kaplan v. U.S.*;[28] the Ninth Circuit in *Monetary II Ltd. Pship. v. Commissioner*;[29] and the Eleventh Circuit in *Davenport Recycling Assocs. v. Comm'r* and in *Monahan v. Comm'r*.[30] As late as November 2009 and on notice of the jurisdictional defect in its *Rhone-Poulenc* decision,

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Associates v. Commissioner, 295 F.3d 280 (2d Cir. 2002)(construing IRC § 6229 as the sole statute of limitations for partnership items and IRC § 6229(a) solely by reference to the partnership return filing: "In this case, absent extensions, any FPAA for Madison's 1982 taxable year should have been issued by April 15, 1986.")

26 *Weiner v. U.S.*, 389 F.3d 152 (5th Cir. 2004).

27 *Williams v. United States*, 165 F.3d 30 (6th Cir. 1998) (Table) 1998 WL 537579, at *3 ("It is well established that [FPPA] statute of limitations challenges are considered to a partnership item").

28 *Kaplan v. United States*, 133 F.3d 469, 473 (7th Cir. 1998) ("this kind of statute of limitation challenge concerns a partnership item" and IRC § 7422 (h) "deprives the federal judiciary of subject matter jurisdiction in individual tax refund challenges involving partnership items.").

29 *Monetary II Ltd. Pship. v. Commissioner*, 47 F.3d 342, 344 (9th Cir. 1995) ("the limitations period for assessing any income tax attributable to a partnership expires three years after the partnership files its return for the tax year in question. 26 U.S.C. § 6229 (a)").

30 *Davenport Recycling Assocs. v. Comm'r*, 220 F.3d 1255, 1260 (11th Cir. 2000) ("under TEFRA, a statute of limitations defense concerns a 'partnership item,' see IRC § 6231 (a)(3)"); *Monahan v. Comm'r*, 321 F.3d 1063, 1065 n. 2 (11th Cir. 2003)("TEFRA provides a mechanism to suspend the statute of limitations with respect to the individual partners to dovetail with the proceedings at the partnership level. Normally, the period for assessing any tax with respect to a partnership item for a specific partnership taxable year is three years from the date the partnership return is filed. 26 U.S.C. § 6229 (a)").

the Tax Court identified the Tenth Circuit as another Circuit Court with which it disagrees.[31] Even the Third Circuit, which reviewed an interlocutory appeal of the Tax Court majority's sharply divided *Rhone-Poulenc* decision, refused to endorse its judicial expansion of federal court jurisdiction.[32] Thus, eight and perhaps nine or ten Circuits properly police the limits of Federal court jurisdiction. Although these decisions employ different rationales, all "have reasoned that because the FPAA limitation issue affects the partnership as a whole," and thus is a partnership item, it should not be litigated in an individual partner proceeding or decided based on individual partner facts, as such a different "result would contravene the purposes of TEFRA."[33]

A very recent case from the Sixth circuit reinforces the understanding of the majority:

> The key change wrought by TEFRA is that tax treatment of all so-called "partnership items" must be determined at the partnership level, not at the partner level. *See* I.R.C. § 6221; *Monti v. United States*, 223 F.3d 76, 78-79 (2d Cir. 2000). ...Conversely, if a partner's tax liability stems from *nonpartnership* items, the IRS may initiate deficiency proceedings against that partner individually without first proceeding against the partnership. *See Callaway v. Commissioner*, 231

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31 *LVI Invest. v. Comm'r*, 2009-254, slip op. at *8-9 (T.C. 11-9-2009) (rejecting the Tenth Circuit's decision in *Anderson v. United States*, 62 F.3d 1428 (10th Cir. 1995) along with the decisions of the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits.)

32 *Rhone-Poulenc*, 249 F.3d at 183.

33 *Weiner*, 389 F.3d at 156-57.

F.3d 106, 108 (2d Cir. 2000) (finding that TEFRA's centralized proceedings do not apply to treatment of nonpartnership items).[34]

Meanwhile, the Federal (*AD Global Fund*) and D.C. (*Andantech*) Circuits opine that the FPAA limitation issue in a TEFRA partnership case brought under § 6226 may be decided based on § 6501 (a) which are legal and factual issues related to individual partners. What these decisions have in common is no analysis of whether § 6501 (a), and the individual partner tax return filing dates, present a legal and factual issue properly characterized as a partnership item under § 6231 (a)(3)—the jurisdictional prerequisite for a TEFRA partnership case under § 6226. This case, for the first time, squarely presents that question for this Court's review.

The D.C. Circuit's *Andantech* decision illustrates the resulting jurisdictional "heads the government wins—tails the taxpayer loses" aspect of this case. On the one hand, it fails to enforce TEFRA's jurisdictional limits in § 6226 (f) by deciding (as urged by the Government) the partnership statute of limitations based on individual partner statute of limitations under § 6501 (a), thus expanding jurisdiction to defeat the partnership's statute of limitations defense.[35] Yet, just a few pages later it reviews § 6226 (f)[36] to determine if subject matter

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34 *Desmet v. Comm'r.*, 581 F.3d 297, 302 (6th Cir. 2009)(*emphasis in original*).

35 *Andantech*, 331 F.3d at 976-9.

36 "[P]ursuant to § 6226(f), subject matter jurisdiction is limited to determin[ing] all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among the partners, and [certain penalties]."

jurisdiction extends to "a determination that the entity is not a partnership for such taxable year" and thus holding for the Government.[37] No more perfect example exists which so completely violates this Court's bar to one sided jurisdictional qualifications by "interpolat[ing] into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction."[38]

In sum, the Federal, D.C. Circuits, and the Fifth Circuit below, broke with the vast majority of Circuit Courts by expanding TEFRA's limited jurisdiction by judicial interpretation. Whether or not the Federal and D.C. Circuits violated this Court's mandate against such expansion inadvertently, the Fifth Circuit below did so consciously and intentionally—warranting this Court's review.

Andantech, 331 F.3d at 981.

37 *Id.* at 981.

38 *United States v. Mine Workers*, 330 U.S. 258, 314 (1947).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 08-60815

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CURR-SPEC PARTNERS, L.P.,
Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

August 11, 2009, Filed

Before REAVLEY, WIENER and SOUTHWICK, Circuit Judges.

JACQUES L. WIENER, JR., Circuit Judge:

Petitioner-Appellant Curr-Spec Partners, L.P. ("Curr-Spec"), asks us to interpret the interplay between the limitation provisions of Internal Revenue Code ("IRC") § 6229(a) and IRC § 6501(a). Specifically, we are asked to determine whether IRC § 6229(a) provides an independent limitations period for Respondent-Appellee Commissioner of Internal Revenue's (the "Commissioner's") issuance of a notice of Final Partnership Administrative Adjustment ("FPAA"). The Tax Court ruled in favor of the Commissioner, holding that IRC § 6229(a) does not provide a separate statute of limitations for partnership items and that the relevant limitations periods are those of each individual partner - generally three years *after the date of filing the individual's return* -- as set forth in IRC § 6501(a).[1] The Tax Court reasoned that the limitations period of IRC § 6229(a) can prolong -- but can never shorten --

the period within which the Commissioner may assess individual tax liabilities attributable to partnership items. Although this issue of statutory interpretation is *res nova* in this circuit, the Tax Court sitting as an *en banc-like* court,[2] the D.C. Circuit,[3] and the Federal Circuit[4] have each resolved it in favor of the Commissioner. Affirming the Tax Court's decision, we now join these other courts and hold that IRC § 6229(a) does not establish an independent statute of limitations for issuing FPAAs.

I. FACTS AND PROCEEDINGS

On October 11, 2000, the partnership, Curr-Spec, filed a Form 1065, U.S. Partnership Return of Income, for the taxable year 1999. More than four years later, on October 13, 2004, the Commissioner issued an FPAA determining that (1) the partnership was a sham, (2) as a result, all transactions in which it engaged would be treated as engaged in by the individual partners directly, (3) all income, deductions, gains, and losses reported by the partnership would be disallowed, and (4) the partners would be treated as having no basis in their respective partnership interests. Curr-Spec timely filed a petition in the Tax Court seeking review of the Commissioner's determination. Curr-Spec then filed motions (1) to dismiss for lack of jurisdiction and to strike, and (2) for summary judgment, contending, *inter alia*, that because the FPAA was issued more than three years after both the due date of the partnership's 1999 return and the date on which it was filed, the period of limitations for assessing tax attributable to partnership items had expired. Curr-Spec based its argument on its interpretation of IRC § 6229(a) as an

independent three-year statute of limitations (subject to specific extensions) for issuing an FPAA.

The Commissioner responded that at least three Curr-Spec partners had claimed net operating loss carryforwards of a 1999 partnership item on their respective individual 2000 and 2001 returns. The Commissioner proposed to assess tax based on the claimed carryforwards on these partners' 2000 and 2001 returns, under the theory that the FPAA was issued less than three years after the partners had filed their respective individual tax returns for those tax years, *viz.*, within the statute of limitations for individual returns as set forth in IRC § 6501(a).

The Tax Court ruled in favor of the Commissioner, emphasizing that the Internal Revenue Code "prescribes no period during which TEFRA[5] partnership-level proceedings, which begin with the mailing of an FPAA, must be commenced." The court held that IRC § 6229(a) does not provide an assessment period independent of the three-year individual limitations period of IRC § 6501(a); that instead IRC § 6229(a) provides a three-year minimum, which can extend IRC § 6501(a)'s period, but cannot curtail it.

This timely appeal followed, in which Curr-Spec challenges only the timeliness of the FPAA.[6]

II. ANALYSIS

A. Standard of Review

We review a Tax Court decision the same way that we would review a district court decision.[7] In the instant

case, Curr-Spec presents purely an issue of statutory interpretation, which we review *de novo*.[8]

B. Statutory Framework

"[TEFRA] . . . prescribes the administrative and litigation procedures for addressing partnership tax issues."[9] "[It] requires partnerships to file informational returns reflecting the distributive shares of income, gains, deductions, and credits attributable to its partners. Accordingly, the individual partners are responsible for reporting their pro rata share of tax on their income tax returns."[10] Items more appropriate for determination at the partnership level are designated "partnership items," which are to be treated at the partnership level; other items are designated "nonpartnership items," which are to be treated at the individual partner level.[11]

When the IRS proposes an adjustment of taxes at the partnership level, it issues a notice of adjustment, the FPAA, which is analogous to the statutory notice of deficiency furnished to individuals.[12] After the FPAA becomes final, the Commissioner may assess tax to the individual partners whose tax returns for the year or years in question remain open under IRC § 6501(a), for those partners' distributive shares of the adjusted partnership items.[13]

IRC § 6501(a) is the three-year statute of limitations which is generally applicable to the Commissioner's assessment of tax.[14] That section states:

> General rule. -- Except as otherwise provided in this section, the amount of any tax imposed by

> this title *shall be assessed within 3 years* after the return was filed . . . , and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. . . .[15]

IRC § 6229(a), which Curr-Spec contends is a three-year statute of limitations for issuing an FPAA -- and which, in the Commissioner's and the Tax Court's views, can only extend but not shorten the IRC § 6501(a) period -- states:

> General rule. -- Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year *shall not expire before* the date which is 3 years after the later of –
>
> > (1) the date on which the partnership return for such taxable year was filed, or
> >
> > (2) the last day for filing such return for such year (determined without regard to extensions).[16]

C. IRC § 6229(a) Does Not Establish an Independent Statute of Limitations for the Issuance of an FPAA

1. Jurisdiction

As an initial matter, Curr-Spec contends that in a partnership proceeding, courts have no jurisdiction to consider the filing date of a partner's individual return

because that is not a partnership item but rather a nonpartnership item.[17] The scope of the Tax Court's jurisdiction in partnership proceedings, Curr-Spec argues, is limited to determination of "all partnership items of the partnership for the partnership taxable year to which the [FPAA] relates, the proper allocation of such items among partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item."[18] Yet, Congress has made clear that any partner "shall be permitted to participate in [partnership-level litigation] solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired *with respect to such person*, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion."[19] Armed with Congress's express blessing, the Tax Court does not exceed its jurisdiction when it considers the filing date of a partner's individual return.[20]

2. Merits

Curr-Spec asserts that even if the Tax Court is not jurisdictionally barred from referencing the filing date of a partner's individual return, a plain reading of IRC § 6229 and IRC § 6501 *in pari materia* yields Curr-Spec's desired result, *viz.*, that IRC § 6229(a) is an independent three-year limitations period for the issuance of an FPAA, which period begins to run on the later of the date that the partnership files its informational return or the date that it is due. In Curr-Spec's view, the TEFRA partnership procedures establish a time line governing when an FPAA may be issued, which is entirely independent of and distinct from -- and which supercedes -- the general time line

specified by IRC § 6501. The Commissioner counters that IRC § 6229(a), by its terms, sets no limitation period for the issuance of an FPAA. The Commissioner argues that -- for partnership items -- IRC § 6229(a) works to extend the IRC § 6501(a) limitations periods of the individual partners under circumstances when those periods would otherwise expire less than three years following the later of the filing date or due date for the filing of the partnership's return, disregarding extensions.

"When the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language."[21] The unambiguous language of IRC § 6229(a) and IRC § 6501(a) mandates our conclusion that IRC § 6501(a) creates a three-year limitations period within which the Commissioner must assess "any tax" on individual partners -- a period which IRC § 6229(a) can never shorten, regardless of the length of time that might have elapsed between the filing of the partnership's informational return and the Commissioner's issuance of an FPAA. Rather, IRC § 6229(a) establishes only the *minimum* time period that, when necessary, extends, i.e., supercedes, the general three-year limitations period of IRC § 6501(a). For partnership items, the otherwise applicable limitations period of IRC § 6501(a) "*shall not expire before* the date which is 3 years after the later of . . . the date on which the partnership return . . . was filed" or the date on which it was due.[22] In reaching this conclusion, we find persuasive (1) the Tax Court's *en banc* decision in *Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*,[23] (2) the D.C. Circuit's opinion in *Andantech L.L.C. v. Commissioner*,[24] and (3) the

Federal Circuit's opinion in *AD Global Fund, LLC ex rel. North Hills Holding, Inc. v. United States.*[25]

In *Rhone-Poulenc*, the Tax Court said:

> Section 6501 unequivocally provides the period of limitations within which "the amount of *any* tax imposed by this title shall be assessed." Generally, the period of limitations so provided is 3 years from the date the taxpayer's return was filed but varies in the case of certain enumerated exceptions. The pertinent language of section 6229 is: "*[T]he period for assessing any tax imposed by subtitle A* with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year *shall not expire before* the date which is 3 years after the later of" the filing or due date of the partnership return. Section 6229 provides a *minimum* period of time for the assessment of any tax attributable to partnership items (or affected items) notwithstanding the period provided for in section 6501, which is ordinarily the *maximum* period for the assessment of any tax. The section 6229 minimum period may expire before or after the section 6501 maximum period. Indeed, section 6501(n)(2) cross-references section 6229 by providing: "For *extension* of period in the case of partnership items (as defined in section 6231(a)(3)), see section 6229." [26]

In *Andantech*, the D.C. Circuit, quoted the foregoing *Rhone-Poulenc* language, and determined that nothing in the Tax Court's reasoning gave it pause.[27] That court

thus concluded that IRC § 6501(a)'s statute of limitations is applicable to all assessments made under the chapter and that IRC § 6229(a) can only extend, not cut short, the IRC § 6501(a) period for partnership items.[28] The *Andantech* court further stated that "the language of § 6229, rather than simply stating a three-year statute of limitations, indicates by the use of the term 'shall not expire' that the provision is intended to dictate a minimum period, but not an absolute restriction."[29]

The Federal Circuit, in *AD Global Fund*, reached the same result as had the D.C. Circuit and the *en banc* Tax Court before it. The court in *AD Global Fund* emphasized that

> [IRC] § 6229(a) unambiguously sets forth a minimum period for assessments of partnership items that may extend the regular statute of limitations in § 6501. Section 6501 explicitly provides that it applies to any tax imposed by the title, which would include tax imposed for partnership items . . . , [and] [n]o exception is provided for assessment of taxes for partnership items.[30]

Additionally, that court found it significant that -- unlike IRC § 6229(a) -- IRC "§ 6501 is couched in mandatory terms setting forth the maximum period within which tax assessments must be made: 'shall be assessed within three years after the return was filed.'"[31] In contrast, IRC "§ 6229(a) employs the term 'shall not expire before,' which creates a minimum period during which the period for tax assessments for partnership items may not end."[32] And, "[w]here

Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[33] The Federal Circuit viewed the use of "shall not expire before" in IRC § 6229(a) as significant. That court described its result as consistent with the TEFRA scheme, which generally requires determination of the tax treatment of partnership items at the partnership level before they are assessed at the partner level.[34] First, the Commissioner ascertains all partnership items in a consolidated partnership-level determination; then IRC § 6501 controls, separately as to each individual partner, the tax consequences of that initial partnership-level determination.[35] IRC § 6229(a) "may extend the regular statute of limitations in § 6501(a) for assessments to individual partners, but it does not alter the statutory scheme of determining partnership items in one partnership-level proceeding."[36]

We perceive no flaw in the interpretations of those courts, which reached the instant issue before we did, and we adopt their analyses.[37] We emphasize, however, that once a partner's individual three-year statute of limitations under IRC § 6501(a) for any given tax year has run without that period having been extended under IRC § 6229 or any other statute,[38] the Commissioner has no authority to assess tax based on any partnership items against that partner for that closed tax year, even if the Commissioner subsequently issues an FPAA for that year. The plain language of IRC § 6501(a) guarantees as much. As counsel for the Commissioner represented at oral argument, "[i]f one partner carried [partnership losses] over ten years, but

the others did not and used it all in '99, the Commissioner wouldn't be able to assess against them. . . . It's only to the extent that a partner's individual statute of limitations is still open that we could do an assessment."

The practical result of our holding today is that the Commissioner may issue an FPAA at *anytime*, subject only to the practical limitation that the FPAA may affect only those partners whose individual returns remain open under IRC § 6501(a) or some extension thereto, such as the *minimum* period of IRC § 6229(a), before which the statute of limitations may not expire. Stated differently, the Commissioner is free to assess partnership-item tax on any taxpayer who, on his individual tax return, has taken advantage of the now-challenged partnership items within the preceding three years (or, in the event of an extension, within the extended statute of limitations). Even though our holding will permit assessments against some partners and not against others, depending on their respective limitations periods under IRC § 6501(a), this interpretation is consistent with the other portions of IRC § 6229, which explicitly contemplate distinct treatment of different partners.[39] If Congress intended a different result, it is for Congress -- not this court -- to re-draft the statutory language.[40]

We continue briefly to explain that our decision today does not contradict this circuit's precedent. On at least two occasions -- in *Weiner v. United States*[41] and *In re Martinez*[42] -- we have referred to IRC § 6229(a) as a three-year statute of limitations. Yet, those descriptions were mere dicta,[43] and they did not address the relationship of IRC § 6229(a) to IRC §

6501(a). They thus do not constrain today's decision. Weiner involved multiple partners who had commenced *partner-level refund suits*, arguing that IRC § 6229(a) statutorily barred an FPAA.[44] There we had no need to consider the merits of the taxpayers' argument because we determined that IRC § 7422(h) deprived us of jurisdiction.[45] IRC § 7422(h) provides that "[n]o action may be brought for a refund attributable to partnership items."[46] And, because we held that the IRC § 6229(a) period is a partnership item, "the district courts lack jurisdiction to decide the FPAA statute of limitations issue."[47] The jurisdictional issue was dispositive in *Weiner*; to the extent we discussed IRC § 6229 as a strict statute of limitations for the issuance of an FPAA, it was mere dicta.

In *In re Martinez*, the issue was the extent to which a partnership's *conflicted* tax-matters partner could bind the other partners to an agreement into which he and the Commissioner had entered to extend the IRC § 6229(a) period.[48] Under IRC § 6229(b)(1)(B), such agreements usually bind all partners.[49] The *In re Martinez* taxpayer (who was not the tax-matters partner) argued that the tax-matters partner's conflict of interest nullified his actions with respect to the partnership. We acknowledged that "there may be times when a tax matters partner's actions beneficial to himself are so contrary to the interests of the partnership that they are rendered null with respect to the partners."[50] We concluded, however, that *In re Martinez* was not such a case, and that the extension granted to the Commissioner applied to all partners. [51] As in *Weiner*, the interplay of IRC § 6229(a) and IRC § 6501(a) was not at issue, and our reference to IRC § 6229(a) as a three-year statute of limitations was dicta.

We thus have not previously had occasion to address squarely the instant issue, and our decision today is not in conflict with our precedent.[52]

III. CONCLUSION

We hold that the Tax Court correctly interpreted IRC § 6229(a) and IRC § 6501(a). IRC § 6229(a) is not an independent statute of limitations, i.e, it sets no maximum period within which the Commissioner must issue an FPAA. The three-year statute of limitations of IRC § 6501(a) is the period within which the Commissioner may assess taxes on an individual partner (subject to *extension*) for partnership items. We also hold that the Tax Court does not overreach its jurisdiction in partnership-level proceedings when, for limitations purposes, it considers whether a partner's individual tax return remains open to assessment.

Footnotes

1Even though the statute of limitations runs three years after the date that the return was *filed*, *see* IRC § 6501(a), a return filed early is generally deemed filed on the date that the return was due, thereby giving the Commissioner more than three years within which to assess tax. *See id.* § 6501(b)(1).

2*Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner*, 114 T.C. 533, 2000 WL 863142 (2000) (en banc). Technically, the Tax Court does not sit *en banc*. Nevertheless, the full Tax Court reviews cases that the Chief Judge selects for review by the entire court. *See* IRC § 7460; David F. Shores, *Deferential Review of Tax Court Decisions*: Dobson *Revisited*, 49 TAX LAW. 629,

646 n.117 (1996). *Rhone-Poulenc* is one such case, and, for simplicity, we will refer to it as decided *en banc*.

3*Andantech L.L.C. v. Commissioner*, 331 F.3d 972, 356 U.S. App. D.C. 387 (D.C. Cir. 2003).

4*AD Global Fund, LLC ex rel. N. Hills Holding, Inc. v. United States*, 481 F.3d 1351 (Fed. Cir. 2007).

5"TEFRA" is the Tax Equity and Fiscal Responsibility Act of 1982.

6In the instant proceedings, Curr-Spec has stipulated to the merits of the Commissioner's adjustments in the FPAA.

7*Minton v. Commissioner*, 562 F.3d 730, 734 (5th Cir. 2009) (per curiam).

8*Copeland v. Commissioner*, 290 F.3d 326, 329 (5th Cir. 2002).

9*United States v. Martinez (In re Martinez)*, 564 F.3d 719, 726 (5th Cir. 2009) (citing Pub. L. No. 97-248, § 402(a), 96 Stat. 648, 653 (1982) (codified as amended at IRC §§ 6221-23)).

10*Weiner v. United States*, 389 F.3d 152, 154 (5th Cir. 2004) (internal citation omitted); *see* IRC § 6031 (partnership returns); *id.* §§ 701-04 (individual partners' reporting distributive shares of partnership income).

11*In re Martinez*, 564 F.3d at 726; *see* IRC § 6221 (mandating that partnership items be determined at the partnership level). A "partnership item" is

statutorily defined as:

> any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

IRC § 6231(a)(3); *see id.* § 6231(a)(4) (defining "nonpartnership item").

12*In re Martinez*, 564 F.3d at 726 (citing IRC § 6223(a)).

13*See* IRC § 6225(a) (stating that the FPAA becomes final if it goes unchallenged for 150 days, or upon final judicial resolution of a petition for review of the FPAA). The IRS may sometimes assess this tax on individual partners, without notice, as a computational adjustment. *See Callaway v. Commissioner*, 231 F.3d 106, 109-10 (2d Cir. 2000) (citing IRC §§ 6225(a), 6230(a)(1), 6231(a)(6)). Other times, factual determinations of "affected items" at the partner level are necessary, which requires the issuance of a notice of deficiency. *See id.* at 110 (citing IRC § 6230(a)(2)(A)(i)); *see also* IRC § 6231(a)(5) (defining "affected item" as "any item to the extent such item is affected by a partnership item").

14*Payne v. Commissioner*, 224 F.3d 415, 419-20 (5th Cir. 2000). This statute of limitations is subject to provisions in IRC § 6501, IRC § 6503, and elsewhere that toll the limitations period, *see Doe v. KPMG, LLP*, 398 F.3d 686, 688-89 (5th Cir. 2005), none of which are

at issue in the instant appeal.

15IRC § 6501(a) (emphasis added).

16*Id.* § 6229(a) (emphasis added).

17As in the principal issue of statutory interpretation presented in Curr-Spec's appeal, our review of the Tax Court's jurisdiction is *de novo*. *Ferguson v. Commissioner*, 568 F.3d 498, 502 (5th Cir. 2009).

18IRC § 6226(f).

19*Id.* § 6226(d)(1) (emphasis added).

20Our opinion in *Weiner v. United States* is not to the contrary. 389 F.3d 152 (5th Cir. 2004). We decided that case on the dissimilar issue "whether district courts have jurisdiction to decide the FPAA statute of limitations question in [individual] refund actions." *Id.* at 155. More specifically, we asked "whether the taxpayers' refund requests [were] attributable to any partnership item such that the district court would be deprived of jurisdiction." *Id.* We concluded that IRC § 6229(a)'s period was a partnership item and that thus "the district courts lack jurisdiction to decide the FPAA statute of limitations issue" (which, today, we conclusively determine is not an independent "statute of limitations"). *See id.* at 156, 159. In *Weiner*, we had no occasion to inquire whether, in a partnership proceeding, the Tax Court was deprived of jurisdiction to consider the filing date of a partner's individual return.

21*United States v. Dison*, 573 F.3d 204, 2009 U.S. App.

LEXIS 14054, 2009 WL 1759029, at *2 (5th Cir. 2009) (internal quotation marks and citation omitted).

22IRC § 6229(a) (emphasis added).

23114 T.C. 533, 2000 WL 863142 (2000) (en banc).

24331 F.3d 972, 356 U.S. App. D.C. 387 (D.C. Cir. 2003).

25481 F.3d 1351 (Fed. Cir. 2007). The Ninth Circuit has also referred to IRC § 6229(a) as a minimum period for assessment. *Bakersfield Energy Partners, LP v. Commissioner*, 568 F.3d 767, 770 n.5 (9th Cir. 2009) ("Subsection (a) [of IRC § 6229] provides the minimum time period in which the IRS can assess a tax deficiency.").

26114 T.C. at 542 (internal citations and footnotes omitted) (emphases added by Tax Court).

27331 F.3d at 977.

28*Id.*

29*Id.*

30481 F.3d at 1354 (internal citation omitted).

31*Id.* (quoting IRC § 6501(a)).

32*Id.*; *see Salman Ranch Ltd. v. United States*, 573 F.3d 1362, 2009 U.S. App. LEXIS 16912, 2009 WL 2256020, at *3 (Fed. Cir. 2009) (explaining that the general three-year period of IRC § 6501(a) applies to partnership items and that IRC § 6229(a) sets only a

minimum period for assessments of partnership items).

33*AD Global Fund*, 481 F.3d at 1354 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)).

34*Id.* at 1354-55.

35*Id.* at 1355.

36*Id.*

37The unambiguous statutory language mandates our result today. Nevertheless, even if the correct decision were not so clear, we would look to the opinions of the D.C. and Federal Circuits for persuasive guidance. *See Alfaro v. Commissioner*, 349 F.3d 225, 229 (5th Cir. 2003) ("We are always chary to create a circuit split.").

38The limitations period may be extended for any of several reasons. As we have discussed, IRC § 6229(a) provides for an extension when three years from the date the partnership return is filed or is due has not yet expired. The IRC § 6229(a) period itself is suspended when the Commissioner files an FPAA. *See* IRC § 6229(d). The FPAA suspends the running of the IRC § 6229(a) period until one year after the close of the period during which a petition for readjustment of the partnership items may be filed, or, if such a petition is filed, one year after the court's decision in that proceeding becomes final. *Id.; see United States v. Martinez (In re Martinez)*, 564 F.3d, 719, 727 (5th Cir. 2009). Of course, if a partner's limitations period has already closed, IRC § 6229(d) cannot re-open that period.

An individual's limitations period would also be extended *forever* if that person filed "a false or fraudulent return with the intent to evade tax." IRC § 6501(c)(1).

39*See, e.g.*, IRC § 6229(b)(1)(A) (permitting partners to enter into *individual agreements* with the Commissioner to extend the three-year period of IRC § 6229(a)); *id.* § 6229(c)(1) (setting different limitations periods for partners when a partnership submits a false or fraudulent return, depending on each partner's involvement in the fraud); *id.* § 6229(h) (providing for a suspension of the IRC § 6229(a) period for a partner who enters bankruptcy proceedings).

40*Lamie v. U.S. Trustee*, 540 U.S. 526, 542, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent.").

41389 F.3d 152, 154-55 (5th Cir. 2004).

42*United States v. Martinez (In re Martinez)*, 564 F.3d 719, 724, 726 (5th Cir. 2009).

43*See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385-86 (5th Cir. 1998) ("That which is 'obiter dictum' is stated only 'by the way' to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision." (citing Charles W. Collier, *Precedent and Legal Authority*, 1988 WIS. L.Rev. 771, 772)); *see also United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (Posner, J.) (noting that as a practical matter, a court can determine

whether a particular passage in an earlier opinion is dictum by considering factors such as whether "the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome," or whether "the passage was not an integral part of the earlier opinion -- it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered").

44389 F.3d at 156.

45*Id.* at 156-59.

46IRC § 7422(h).

47*See Weiner*, 389 F.3d at 156, 159. We did state, however, that one factor in favor of determination at the partnership level was that "[t]he timeliness of an FPAA affects the IRS's ability to make adjustments to partnership items, which in turn affects all partners alike." *Id.* at 158. This statement remains true because an extension of the IRC § 6501(a) statute of limitations by IRC § 6229(a) affects the IRS's ability to adjust partnership items, which affects all partners alike.

48*United States v. Martinez (In re Martinez)*, 564 F.3d 719, 727 (5th Cir. 2009).

49*See* IRC § 6229(b)(1)(B) ("The period described in subsection (a) . . . may be extended . . . with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner . . . before the expiration of such period.").

50*In re Martinez*, 564 F.3d at 728.

51*Id.*

52Curr-Spec also interprets the Second Circuit's opinion in *Callaway* as rejecting *Rhone-Poulenc*. *Callaway v. Commissioner*, 231 F.3d 106, 110 (2d Cir. 2000). As in our circuit's precedent, *Callaway's* discussion of IRC § 6229(a) occurred in dicta. *See* id. at 110 (referring to IRC § 6229 as a three-year statute of limitations, which "supercedes" the individual partner's three-year period under IRC § 6501); id. at 112-13 (describing the effect that IRC § 6229(a) would have had in the absence of an extension). The issue in *Callaway* was the conversion of partnership items into nonpartnership items. *See id.* at 116. The relationship of IRC § 6229(a) to IRC § 6501(a) was not at issue. In fact, *Callaway* interpreted the similar "shall not expire before . . . 1 year" language of IRC § 6229(f) as prescribing the time within which "the limitations period on assessments . . . could not have expired *sooner*." *Id.* at 122 & n.20 (emphasis in original). The court expressly said that, depending on the facts, such a provision might "not provide the limiting date." *Id.* Our analysis in the instant case is consistent with such an interpretation. Additionally, the Second Circuit has, in a subsequent case, cautioned that IRC "section 6229(a), by its terms, does not purport to *limit* the time available to assess tax, but only to *extend* limitations otherwise applicable." *Field v. United States*, 381 F.3d 109, 112 n.1 (2d Cir. 2004) (emphasis in original). Such language offers a clear indication that the Second Circuit does not view *Callaway* as having held the opposite. *See U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 149 (2d Cir. 2001) ("[W]e

will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court." (internal quotation marks omitted)).

No. 1350-05

UNITED STATES TAX COURT

CURR-SPEC PARTNERS, LP, CURR-SPEC MANAGERS, LLC, TAX MATTERS PARTNER, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent *

September 24, 2007, Filed

COUNSEL: J. Winston Krause, for petitioner.

Donna F. Herbert and Jonathon H. Sloat, for respondent.

MEMORANDUM OPINION

WELLS, Judge: The instant matter is a so-called Son-of-Boss case [1] and is before the Court on the following motions: (1) Petitioner's motion to dismiss for lack of jurisdiction and to strike; (2) petitioner's motion for summary judgment; (3) respondent's motion for summary judgment; and (4) petitioner's motion for leave to file a second amended petition. For the reasons stated below, we shall grant petitioner's motion for leave to file a second amended petition and deny the remaining motions. Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code, as amended.

BACKGROUND

Curr-Spec Partners, L.P. (the partnership), filed a Form 1065, U.S. Partnership Return of Income, for the taxable year 1999 on or about October 11, 2000. The partnership reported $ 6,239,938 of capital contributions, a net loss of $ 2,343, and distributions to partners of $ 6,237,595.

On October 13, 2004, respondent issued Curr-Spec Managers, L.L.C., Tax Matters Partner (petitioner), a notice of final partnership administrative adjustment (FPAA) for the taxable year 1999. Respondent determined, among other things: (1) The partnership was a sham; (2) as a result, all transactions engaged in by the partnership would be treated as engaged in directly by the partners; (3) all income, deductions, gains, and losses reported by the partnership would be disallowed; and (4) the partners would be treated as having no bases in their respective partnership interests. Petitioner filed a timely petition for review of respondent's determination. [2]

1. Petitioner's Motion To Dismiss for Lack of Jurisdiction and To Strike and Petitioner's Motion for Summary Judgment

Petitioner filed a motion to dismiss for lack of jurisdiction and to strike. The motion states that, because the FPAA was issued more than 3 years after the partnership filed its 1999 return, the period of limitations for assessing tax attributable to partnership items has expired. Petitioner asks the Court to strike the portion of respondent's answer that addresses matters outside the Court's jurisdiction. Petitioner also filed a motion for summary judgment that advances similar arguments. Respondent concedes

that the FPAA was issued more than 3 years after the partnership filed its 1999 return.

Respondent contends, however, that at least three partners claimed a net operating loss (NOL) carryforward of a 1999 partnership item in 2000 and 2001. Respondent wishes to disallow the claimed NOL carryforwards if the adjustments in the FPAA are upheld. Respondent contends that the FPAA was issued less than 3 years after the partners filed their respective 2000 and 2001 tax returns and, therefore, the assessment period for those years has not expired.

2. Respondent's Motion for Summary Judgment and Petitioner's Motion for Leave To File A Second Amended Petition

The FPAA makes a number of adjustments to the 1999 partnership return. Although the petition asserts that the FPAA was untimely, it does not assign error to the determination that the partnership was a sham or to the other adjustments discussed above. Respondent filed a motion for summary judgment, asserting that any issues not raised in the petition are deemed conceded under Rule 34(b)(4). After respondent had filed the motion for summary judgment, petitioner filed a motion for leave to file a second amended petition. The motion states that "Petitioner wishes to amend its petition to more particularly comply with [Rule] 34(b)(4) by alleging further factual basis for respondent's various errors as contained in * * * [the FPAA]." The proposed second amended petition assigns error to each adjustment in the FPAA.

DISCUSSION

I. Whether the Assessment Period Has Expired

Summary judgment is appropriate "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), affd. 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences will be read in a manner most favorable to the party opposing summary judgment. Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985).

The instant case is a partnership-level proceeding subject to the unified audit and litigation procedures of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, sec. 401, 96 Stat. 648. The Internal Revenue Code prescribes no period during which TEFRA partnership-level proceedings, which begin with the mailing of an FPAA, must be commenced. Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, 114 T.C. 533, 534 (2000). If partnership-level proceedings are commenced after the time for assessing tax against the partners has expired, however, the proceedings will be of no avail because the expiration of the period for assessing tax against the partners will bar any assessments attributable to the partnership items. Id. at 534-535.

In general, section 6501(a) provides that the amount of any tax imposed shall be assessed within 3 years after the return was filed. The term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss,

deduction, or credit). Id. Section 6229(a) provides, however, that the period for assessing tax attributable to partnership items for a partnership taxable year shall not expire before the date which is 3 years after the later of (1) the date on which the partnership return for such taxable year was filed, or (2) the last day for filing such return for such year.

In Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, supra, we addressed the interaction of sections 6229 and 6501. We rejected the taxpayer's argument that section 6229 provides an assessment period that is independent of the period described in section 6501. We held that sections 6229 and 6501 provide alternative periods within which to assess tax with respect to partnership items, with the later-expiring period governing in a particular case. Id. at 540-541. We also held that the issuance of an FPAA suspends the period to assess tax under section 6501. Id. at 552-553. We followed this holding in Andantech L.L.C. v. Commissioner, T.C. Memo. 2002-97, affd. in relevant part and remanded in part 356 U.S. App. D.C. 387, 331 F.3d 972 (D.C. Cir. 2003).

The instant case presents a slightly different issue from Rhone-Poulenc and Andantech, however, because respondent issued the FPAA for the taxable year 1999 while conceding that the assessment period for that year had expired. Respondent instead seeks to assess tax for the taxable years 2000 and 2001 that is attributable to a 1999 partnership item. We recently addressed a similar situation and held that a 1999 FPAA was timely even though the assessment period for that year had expired. See Kligfeld Holdings v. Commissioner, 128 T.C. 192 (2007); see also G-5 Inv. Pship. v. Commissioner, 128 T.C. 186 (2007). Petitioner

does not dispute that the FPAA was issued within 3 years of the time the partners filed their respective 2000 and 2001 tax returns. Accordingly, under the holding of Kligfeld Holdings and similar cases, the assessment period has not expired and remains suspended.

We note, however, that none of the above-cited cases was appealable to the Court of Appeals for the Fifth Circuit. [3] Under the Golsen rule, we follow the law of the Court of Appeals to which a case is appealable. Golsen v. Commissioner, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971). We therefore consider whether we must reach a contrary result under Fifth Circuit law.

In Weiner v. United States, 389 F.3d 152 (5th Cir. 2004), the taxpayers appealed from decisions entered against them in refund suits. The taxpayers earlier had been parties to partnership-level proceedings in the Tax Court. Pursuant to settlements of their claims to flow-through deductions from the partnerships involved in those proceedings, the Commissioner assessed tax and interest against them. The taxpayers then commenced the refund suits in District Court, contending that the assessments were barred by the statute of limitations. Id. at 153-154.

The Court of Appeals held that the District Courts lacked jurisdiction to decide the statute of limitations issue because it was a partnership item. Id. at 157. Under TEFRA, the treatment of all partnership items must be determined at the partnership level. Sec. 6221. Accordingly, the District Courts could not decide the statute of limitations issue in a partner-level

proceeding. Weiner v. United States, supra at 157. In reaching its conclusion, the Court of Appeals stated that the Commissioner has "three years from the later of (1) the date a partnership return is due, or (2) the date the partnership return is filed, to issue an FPAA." Id. at 154-155 (citing section 6229(a)).

On its face, Weiner might suggest that the Court of Appeals for the Fifth Circuit views the assessment period under section 6229 as independent of the period provided in section 6501. The Court of Appeals in Weiner, however, did not mention section 6501 or discuss any of the cases which hold that sections 6229 and 6501 establish alternative assessment periods. Furthermore, because the Court of Appeals concluded that the statute of limitations issue was a partnership item, the result would have been the same regardless of whether the assessment period was controlled by section 6229 or 6501. See id. at 155 ("The more precise question in this case * * * is whether the taxpayers' refund requests are attributable to any partnership item such that the district court would be deprived of jurisdiction."). The U.S. Court of Federal Claims would also distinguish Weiner from the facts of the instant case. In Grapevine Imports, Ltd. v. United States, 71 Fed. Cl. 324 (2006), the court concluded that the above-quoted language from Weiner as to the date of expiration of the assessment period was dictum and that the Court of Appeals was "not focused on the issue involving the interplay between sections 6229(a) and 6501." Id. at 330.

We conclude that the period for assessing tax against the partners has not expired. Neither Weiner nor any of the other cases cited by petitioner dictate a contrary result. Accordingly, we shall deny petitioner's motion to

dismiss for lack of jurisdiction and to strike and petitioner's motion for summary judgment. [4]

II. Whether Petitioner May Amend Its Petition A Second Time

Rule 34(b)(4) provides that the petition in a deficiency or liability action shall contain "Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner * * *. * * * Any issue not raised in the assignments of error shall be deemed to be conceded." Rule 241(d)(1)(C) provides a similar rule for a petition in a partnership action.

Petitioner seeks to amend its petition a second time to assign error to the adjustments in the FPAA. Rule 41(a) provides in part: "A party may amend a pleading once as a matter of course at any time before a responsive pleading is served. * * * Otherwise a party may amend a pleading only by leave of Court or by written consent of the adverse party, and leave shall be given freely when justice so requires." Rule 41 is similar to rule 15(a) of the Federal Rules of Civil Procedure, which also declares that leave to amend "shall be given freely when justice so requires." Kramer v. Commissioner, 89 T.C. 1081, 1084-1085 (1987) (citing Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). We have looked to holdings under rule 15(a) of the Federal Rules of Civil Procedure for guidance in interpreting Rule 41. Id.

The granting or denial of an opportunity to amend a pleading is within the discretion of the trial court. See Foman v. Davis, supra at 182. The Court of Appeals for the Fifth Circuit has held, however, that rule 15(a) of

the Federal Rules of Civil Procedure "severely restricts" the trial court's discretion and "evinces a bias in favor of granting leave to amend." Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 (5th Cir. 1981). Unless there is a substantial reason to deny leave to amend, the discretion of the trial court is not broad enough to permit denial. Id. at 598. "The types of reasons that might justify denial of permission to amend a pleading include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, and undue prejudice to the opposing party." Id. (citations omitted); see also Pinson v. Commissioner, T.C. Memo. 2000-393.

Respondent argues that we should deny petitioner's motion because of undue delay, noting that the motion was filed approximately 11 months after the amended petition was filed. See supra note 4. Unless the delay is excessive, however, mere passage of time need not result in refusal of leave to amend. Dussouy v. Gulf Coast Inv. Corp., supra (reversing denial of motion for leave to amend filed 41 days after a party was dismissed from the case); cf. Russo v. Commissioner, 98 T.C. 28 (1992) (denying motion filed 8 years after the petition was filed).

We also note that the instant case was not scheduled for trial when petitioner filed its motion. [5] It is therefore distinguishable from many of the cases in which the denial of a motion for leave to amend was upheld. See, e.g., Ashe v. Corley, 992 F.2d 540 (5th Cir. 1993) (upholding denial of a motion for leave to amend filed 1 week before trial); Jackson v. Columbus Dodge, Inc., 676 F.2d 120 (5th Cir. 1982) (upholding denial of a motion filed 1 day before a pretrial conference and 19

months after the complaint was filed); Rhodes v. Amarillo Hospital Dist., 654 F.2d 1148 (5th Cir. 1981) (upholding denial of a motion filed 30 months after the initial complaint and 3 weeks before trial). Accordingly, we conclude that there is no undue delay in the instant case.

Respondent contends that respondent will be prejudiced if petitioner's motion is granted because additional discovery will be necessary. The need for additional discovery is a factor to consider in granting or denying a motion for leave to amend. See Ross v. Houston Indep. School Dist., 699 F.2d 218, 229 (5th Cir. 1983). Additional discovery often will be required, however, when a petition is amended. The nonmoving party generally is not prejudiced if it can present evidence as to the issues raised by the amendment. See Steiner v. Commissioner, T.C. Memo. 1995-122; see also Ross v. Houston Indep. School Dist., supra (upholding denial of a motion for leave where the amendment would require additional discovery, add 26 new parties, and likely require several additional years for preparation and trial of the case); cf. Kramer v. Commissioner, supra at 1085 (denying a motion for leave filed after trial because the Commissioner could not offer evidence as to the newly raised issue).

We also note that, aside from the statute of limitations issue discussed above, petitioner appears to address only the adjustments made in the FPAA. Thus, the instant case is not one where the amendment would establish "an entirely new factual basis" for the movant's claims. Cf. Little v. Liquid Air Corp., 952 F.2d 841, 846 (5th Cir. 1992). In sum, any burden of additional discovery does not overcome the factors in

favor of granting leave to amend. See Dussouy v. Gulf Coast Inv. Corp., supra.

Finally, respondent appears to argue that petitioner has shown bad faith. Respondent contends that petitioner's motion is "an apparent attempt to escape judgment as a matter of law based on respondent's motion for summary judgment". Respondent cites several cases upholding the denial of a motion for leave to amend that was filed after the opposing party had filed a motion for summary judgment. See, e.g., Little v. Liquid Air Corp., supra; Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146 (5th Cir. 1990); Layfield v. Bill Heard Chevrolet Co., 607 F.2d 1097 (5th Cir. 1979).

As respondent acknowledges, however, there is no per se rule requiring the trial court to deny a motion for leave to amend after a motion for summary judgment has been filed. See Zaidi v. Ehrlich, 732 F.2d 1218, 1220 (5th Cir. 1984); Bamm, Inc. v. GAF Corp., 651 F.2d 389, 391-392 (5th Cir. 1981). Considering that the instant case was not scheduled for trial when petitioner filed its motion and that the issues are largely confined to the adjustments made in the FPAA, we conclude that it is appropriate to allow petitioner to amend its petition again.

Having decided that petitioner may amend its petition again, we shall deny respondent's motion for summary judgment. The second amended petition assigns error to the adjustments in the FPAA, thus raising genuine issues as to material facts. Summary judgment therefore is inappropriate. See Rule 121(b); Sundstrand Corp. v. Commissioner, 98 T.C. at 520.

To reflect the foregoing,

An appropriate order will be issued.

Footnotes

* The Court issued an opinion in this case, T.C. Memo. 2006266, on Dec. 14, 2006, which was withdrawn by order dated Jan. 3, 2007.

1 See Kligfeld Holdings v. Commissioner, 128 T.C. 192 (2007); see also G-5 Inv. Pship. v. Commissioner, 128 T.C. 186 (2007).

2 Petitioner filed a petition in January 2005 and an amended petition in September 2005. For convenience, we refer to these collectively as the petition.

3 The parties agree that the instant case is appealable to the Court of Appeals for the Fifth Circuit.

4 Petitioner also argues at length that we cannot consider when the partners filed their respective tax returns because the filing dates are nonpartnership items. This position contradicts the holding of Rhone-Poulenc Surfactants & Specialties, L.P. v. Commissioner, 114 T.C. 533 (2000), where we examined the partners' filing dates to decide when the assessment period under sec. 6501 expired. Although petitioner contends its position does not conflict with our existing caselaw, petitioner has not explained how the Court can apply the holding of Rhone-Poulenc without examining the partners' filing dates. Petitioner's argument is without merit.

5 The instant case was calendared for trial on the Oct. 30, 2006, San Antonio, Texas, trial session but was continued after the parties filed a joint motion for continuance of trial.

Filed 10/16/2009
No. 08-60815
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CURR-SPEC PARTNERS, L.P.,
Petitioner-Appellant
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

Appeal from a Decision of the United States Tax Court

ON PETITION FOR REHEARING EN BANC

Before REAVLEY, WIENER and SOUTHWICK, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.